Economic Development (Low Cost Houses) Sdn Bhd v Majlis Perbandaran Seberang Perai

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01–231 OF 2010
LOW HOP BING, SYED AHMAD HELMY AND BALIA YUSOF JJCA
22 MAY 2012

Civil Procedure — Specific performance — Land development — Transfer of plot of land as condition — Whether condition ultra vires — Public amenities on plot of land — Whether structures on plot illegal — Whether specific performance should be granted — Appeal — Whether originating summons aimed at recovery of land — Whether quit rent precluded plaintiff's originating summons for specific performance

The appellant ('the defendant') had applied and submitted necessary layout plans to the respondent ('the plaintiff'), the local planning authority of Seberang Perai to seek permission to develop one Taman Senangan. The plaintiff approved the plans and imposed a condition that the defendant would have to surrender a one acre space ('the plot') to the plaintiff with a nominal consideration of RM1 ('the condition'). The necessary documents to transfer the plot to the plaintiff were prepared but since they contained errors and the transfer could not take effect, the documents had to be returned to the defendant twice. The plaintiff's solicitors issued a notice demanding the defendant to forward the documents. The defendant failed to comply and subsequently the plaintiff obtained a specific performance compelling the defendant to transfer the plot. Aggrieved, the defendant appealed against the decision of the High Court raised the issues of whether the aim of the plaintiff's originating summons was for recovery of land; that the plaintiff's acceptance of the defendant's payment for the plot's quit rent precluded the plaintiff's originating summons for specific performance; that the condition was ultra vires; and that specific performance should have been refused because there were illegal structures on the plot.

Held, dismissing the appeal with costs:

(1) The plaintiff's originating summons was an action for recovery of land. Section 9(1) of the Limitation Act 1953 ('the Act') provides that the limitation period for an action for recovery of land shall be 12 years. In relation to the defendant's argument that the six-year limitation period had triggered in 1992 and not 1997, the defendant's solicitors had written to the plaintiff, acknowledging the plaintiff's rights over the plot. The defendant's solicitors had forwarded the erroneous documents to the

plaintiff's solicitors to effect the transfer of the plot to the plaintiff. The defendant's conduct clearly constituted an acknowledgement of the plaintiff's rights over the plot. Section 26(1)(a) of the Act provides that where there is an acknowledgement in 1997, the limitation period would start from 1997 and end in 2009. Hence, the plaintiff's originating summons which commenced in 2007 was clearly within the 12 year limitation period. There was no necessity to consider the notice of demand issued by the plaintiff's solicitors in 2006 (see paras 12–13).

(2) The quit rent was paid to the land office and not to the plaintiff. The plaintiff being the local planning authority, did not have the power or the jurisdiction to collect the quit rent. The defendant's own documents clearly showed that the defendant had been paying the quit rent to the land office. The defendant's mere act of paying the quit rent to the land office did not ipso facto affect the plaintiff's right to the plot (see paras 16 & 18–19).

(3) The importance of providing for open spaces in the development project for the benefit of the general public cannot be denied and had indeed been affirmed in ss 22(1) and 22(5)(h) of the Town and Country Planning Act 1976. The open space had been laid out or reserved for laying out wholly or partly as a public garden, park, sports and recreational ground, pleasure ground, walk or as a public place. Therefore, the condition was not ultra vires (see para 25).

(4) The presence or absence of any structures on the plot was irrelevant. The defendant's contention was wholly without merits (see paras 29–30).

[Bahasa Malaysia summary

Perayu ('defendan') telah memohon dan mengemukakan pelan susun atur yang perlu kepada responden ('plaintif'), pihak berkuasa perancang tempatan Seberang Perai untuk mendapatkan kebenaran bagi membangunkan satu Taman Senangan. Plaintif meluluskan rancangan dan mengenakan syarat bahawa defendan perlu menyerahkan ruang satu ekar ('plot') kepada plaintif dengan pertimbangan nominal sebanyak RM1 ('syarat'). Dokumen-dokumen yang diperlukan untuk memindahkan plot kepada plaintif telah disediakan tetapi oleh kerana terdapat kesilapan dan pemindahan tidak dapat berkuatkuasa, dokumen-dokumen terpaksa dikembalikan kepada defendan dua kali. Peguamcara plaintif mengeluarkan notis menuntut defendan untuk mengemukakan dokumen-dokumen. Defendan gagal mematuhi dan kemudiannya plaintif mendapat pelaksanaan spesifik ke atas defendan memerintahkannya untuk memindahkan plot. Terkilan, defendan merayu terhadap keputusan Mahkamah Tinggi dan membangkitkan isu-isu sama ada matlamat saman pemula plaintif adalah untuk pemulihan tanah; bahawa penerimaan plaintif bagi pembayaran cukai tanah defendan bagi plot menghalang saman pemula plaintif bagi pelaksanaan spesifik; bahawa syarat

tersebut adalah ultra vires dan bahawa pelaksanaan spesifik sepatutnya ditolak kerana terdapat struktur tidak sah di atas plot. A

Diputuskan, menolak rayuan dengan kos:

(1) Saman pemula plaintif adalah suatu tindakan untuk pemulihan tanah. Seksyen 9(1) Akta Had Masa 1953 ('Akta') memperuntukkan bahawa tempoh had masa untuk tindakan pemulihan tanah adalah 12 tahun. Berhubung dengan hujah defendan bahawa tempoh had masa enam tahun telah berlaku pada tahun 1992 dan bukan 1997, peguamcara defendan telah menulis kepada plaintif, mengiktiraf hak-hak plaintif ke atas plot. Peguamcara defendan telah mengemukakan dokumen-dokumen yang mengandungi kesalahan kepada peguam plaintif untuk melaksanakan pemindahan plot kepada plaintif. Tindakan defendan jelas merupakan pengakuan hak-hak plaintif atas plot. Seksyen 26(1)(a) Akta memperuntukkan bahawa di mana terdapat satu pengiktirafan pada tahun 1997, tempoh had akan bermula dari tahun 1997 dan berakhir pada tahun 2009. Oleh itu, saman pemula plaintif yang dimulakan pada tahun 2007 dengan jelas dalam tempoh had masa 12 tahun. Tiada keperluan untuk mempertimbangkan notis permintaan yang dikeluarkan oleh peguam plaintif pada tahun 2006 (lihat perenggan 12–13). B C D E

(2) Cukai tanah telah dibayar kepada pejabat tanah dan bukan kepada plaintif. Plaintif sebagai pihak berkuasa perancang tempatan, tidak mempunyai kuasa atau bidang kuasa untuk memungut cukai tanah. Dokumen-dokumen defendan sendiri jelas menunjukkan bahawa defendan telah membayar cukai tanah ke pejabat tanah. Tindakan defendan yang setakat membayar cukai tanah ke pejabat tanah tidak secara *ipso facto* menjejaskan hak plaintif ke atas plot (lihat perenggan 16 & 18–19). F G

(3) Kepentingan menyediakan ruang terbuka dalam projek pembangunan untuk manfaat orang awam tidak boleh dinafikan dan sememangnya telah diperuntukkan di bawah ss 22(1) dan 22(5)(h) Akta Perancangan Bandar dan Desa 1976. Ruang terbuka telah disusun atur atau dirizabkan untuk disusun atur keseluruhannya atau sebahagiannya sebagai suatu taman bunga awam, taman, tempat sukan dan rekreasi, tempat bersantai, berjalan atau sebagai suatu tempat awam. Oleh itu, syarat tersebut tidak ultra vires (lihat perenggan 25). H I

(4) Kehadiran atau ketiadaan mana-mana struktur di atas plot adalah tidak relevan. Hujahan defendan adalah secara keseluruhannya tidak bermerit (lihat perenggan 29–30).]

Cases referred to

Fawcett Properties Ltd v Buckingham County Council [1960] 3 All ER 503, HL (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Legislation referred to

Limitation Act 1953 ss 9(1), 26(1)(a)
Town and Country Planning Act 1976 ss 2, 22(1), 22(5)(h)

Ramesh Abraham (Jason Gopal with him) (Arizal Jailani & Co) for the appellant.
Kanesh Sundrum (Kanesh Sundrum & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This is the appeal by the appellant (the defendant) against the decision of the learned High Court judge who had allowed the respondent's (the plaintiff's) claim and ordered specific performance directing the defendant to transfer the land known as Lot 4319, GRN 100974, Mukim 7, Daerah Seberang Perai Utara, Pulau Pinang (the plot) to the plaintiff.

FACTUAL BACKGROUND

[2] The plaintiff's originating summons ('OS') and the affidavits in support reveal that the plaintiff is the local planning authority for the area of Seberang Perai.

[3] The defendant applied and submitted the necessary layout plans to the plaintiff for planning permission to develop an area known as Taman Senangan.

[4] The plaintiff approved the plans and imposed a condition, inter alia, requiring the defendant to surrender the plot to the plaintiff for a nominal consideration of RM1 (the condition). The defendant accepted the condition by signing and returning a copy of the approved plans to the plaintiff. The plot is an open space with an area of about one acre.

[5] In 1997, the defendant prepared the necessary documents to transfer the plot to the plaintiff. However, these transfer documents contained errors and the transfer could not be effected. The plaintiff had to return the documents twice to the defendant's solicitors for rectification, but there was no further action and the transfer did not take place.

[6] On 3 November 2006, the plaintiff's solicitors issued a notice of demand to the defendant requiring the defendant to forward the documents to the plaintiff.

[7] Upon the defendant's failure to comply with the notice of demand, the plaintiff sought and obtained specific performance to compel the defendant to transfer the plot to the plaintiff.

[8] Hence, this appeal by the defendant.

LIMITATION

[9] The defendant's learned counsel Mr Ramesh Abraham (assisted by Mr Jason Gopal) submitted that the plaintiff's claim is based on contract and so the six-year limitation period applies, in which case, time began to run from 1992 so that the plaintiff's OS filed in 2007 is statute-barred.

[10] Learned counsel Mr Kanesh Sundrum contended for the plaintiff that the plaintiff's OS is not statute-barred as the plaintiff's claim is for recovery of land and so the limitation period is 12 years. He stressed that in 1997, there was an acknowledgement by the defendant's solicitors of the plaintiff's rights over the plot. Further, there was the notice of demand issued by the plaintiff's solicitors in 2006.

[11] Under this head, we identify the question for consideration as follows:

> Is the plaintiff's OS aimed at the recovery of land (ie the plot) so that the limitation period is 12 years?

[12] We are of the view that the plaintiff's OS is an action for recovery of land. Section 9(1) of the Limitation Act 1953 provides that the limitation period for an action for recovery of land shall be 12 years (a reference hereinafter to a section is a reference to that section in the Limitation Act 1953).

[13] In relation to the defendant's argument that the six-year limitation period had triggered in 1992 and not 1997, we note that the defendant's solicitors had written to the plaintiff acknowledging the plaintiff's rights over the plot. The defendant's solicitors had forwarded the documents (with errors) to the plaintiff's solicitors to effect the transfer of the plot to the plaintiff. The defendant's conduct clearly constituted an acknowledgement of the plaintiff's rights over the plot. Section 26(1)(a) provides that where there is an acknowledgement (by the defendant in the instant appeal) in 1997, the limitation period would start from 1997 and end in 2009. Hence, the

plaintiff's OS commenced in 2007 is clearly within the 12-year limitation period. There is therefore no necessity for us to consider the notice of demand issued by the plaintiff's solicitors in 2006.

[14] The judgment of the Federal Court delivered by Gill FJ (later CJ (Malaya)) in *Nasri v Mesah* [1971] 1 MLJ 32 (FC) at p 33 H-I rt column made it clear that whether the action is for specific performance or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[15] Our answer to the above question is in the affirmative.

THE DEFENDANT'S PAYMENT OF QUIT RENT

[16] The defendant relied on its payment of the quit rent for the plot and argued that the plaintiff's acceptance of such payment precluded the plaintiff's OS for specific performance.

[17] The plaintiff submitted that this argument is totally misconceived and wrong.

[18] With the utmost respect to the defendant's learned counsel, it is necessary for us to point out that the quit rent was paid to the land office and not the plaintiff. The plaintiff being the local planning authority does not have the power or jurisdiction to collect the quit rent. The defendant's own documents clearly show that the defendant had been paying the quit rent to the land office.

[19] The defendant's submission on this issue is perplexing. The defendant knew very well that the plot was meant to be transferred to the plaintiff. The defendant's mere act of paying the quit rent to the land office does not ipso facto affect the plaintiff's right to the plot. Consequently, the decree of specific performance has been correctly granted against the defendant.

WAS THE CONDITION ULTRA VIRES?

[20] The defendant argued that the condition was *ultra vires* and so specific performance should not be granted against it.

[21] The plaintiff responded that the condition is valid under s 22(1) and s 22(5)(h) of the Town and Country Planning Act 1976 (s 22(1) and s 22(5)(h)) and therefore valid.

[22] Sections 22(1) and 22(5)(h) provide for the treatment of an application for planning, and the conditions which may be imposed by the plaintiff as the local planning authority. The relevant portions of s 22(1) and 22(5)(h) read as follows:

> 22 Treatment of applications
>
> (1) As soon as possible after the receipt of an application for planning permission, … the local planning authority shall decide on the application for planning permission.
>
> (5) Conditions imposed under subsection (3) may include any or all of the following conditions, that is to say, conditions:
>
> (h) for securing the making up of open spaces in accordance with the approved layout plans.

[23] Section 22(1) and 22(5)(h) expressly provide for the imposition of a condition pertaining to open spaces in accordance with the approved layout plans for the development of the land.

[24] By way of analogy, in *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503 (HL), the issue concerned the validity of a condition which the respondent (Birmingham County Council) as the local planning authority, in exercise of powers conferred on it by s 14(1) of the Town and Country Planning Act 1947, imposed on the appellant (Fawcett Properties Ltd) when granting planning permission for the development of two farm workers' cottages. The condition was that the occupation of the cottage was to be limited to persons employed in agriculture or in forestry. This condition was challenged as ultra vires. Lord Denning spoke in the House of Lords and held that:

> When planning conditions are made, as here, so as to maintain the green belt against those who would invade it, they ought to be supported if possible. And credit ought to be given to those who have to administer them, that they will be reasonably administered …

[25] In the instant appeal, the importance of providing for 'open spaces' in the development project for the benefit of the general public cannot be denied and has indeed been affirmed in s 22(1) and 22(5)(h). The open space has been laid out or reserved for laying out wholly or partly as a public garden, park, sports and recreational ground, pleasure ground, walk or as a public place: s 2 of the same Act.

[26] We therefore hold that the condition is not ultra vires.

STRUCTURES ON THE PLOT

[27] The defendant finally maintained that there are illegal structures on the plot and so specific performance should have been refused.

[28] The plaintiff took the position that the main issue here is whether the defendant should transfer the plot to the plaintiff pursuant to the condition.

[29] In our view, the presence or absence of any structure(s) on the plot is irrelevant. In any event, the pictures tendered by the defendant at pp 122–124 of the appeal record clearly show that the building is called 'Dewan Orang Ramai Taman Senangan' ie a public hall in Taman Senangan. The amenities that can be seen in the pictures are public amenities which are completely compatible with the use of the plot as a public open space.

[30] We are of the view that the defendant's contention is wholly without merits.

CONCLUSION

[31] On the foregoing grounds, we dismiss this appeal with costs of RM10,000 and affirm the decision of the High Court.

[32] Deposit to the plaintiff (the respondent) on account of the fixed costs.

Appeal dismissed with costs.

Reported by Ibnu Aswan